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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1973.

No. 73-1401

FRANCIS X. BECKER, individually and on behalf of all other taxpayers of the Village of Lynbrook similarly situated, and on behalf of all other taxpayers residing in the incorporated villages of the State of New York similarly situated and FRANCIS X. BECKER, Mayor of the Incorporated Village of Lynbrook, New York, WILLIAM E. BUZZEO, KURT ARNDT, WILLIAM J. O'BRIEN and LAWRENCE B. FLORIO, individually and as Trustees of the Incorporated Village of Lynbrook, and the INCORPORATED VILLAGE OF LYNBROOK, NEW YORK,

Petitioners,

against

ARTHUR LEVITT, as Comptroller of the State of New York, and NORMAN F. GALLMAN, as Commissioner of Taxation & Finance of the State of New York,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

The petitioners above named respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in this proceeding December 21, 1973, affirming an order of the Eastern District Court of New York (Travia, J.) which granted respondents' motion to dismiss the complaint for lack of subject-matter jurisdiction and for failure to state a claim on which relief can be granted.

Opinion Below.

The opinion of the Court of Appeals for the Second Circuit appears in the Appendix.

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit was entered on December 21, 1973. No petition for rehearing has been made to the Court of Appeals and this petition was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U. S. C. Section 1254 (1).

Question Presented.

Whether portions of Section 54 of the State Finance Law of the State of New York are violative of Article IV, Section 2, of the U. S. Constitution and the 14th Amendment in depriving petitioners of the equal protection of the law, by distributing *per capita* state aid in a ratio of six (6) to one (1) between cities and villages of the same size, population-wise. The text of said Section 54 is set forth in the appendix annexed to the amended complaint.

Statement of the Case.

This action was instituted by the petitioners both in their capacities as individual taxpayers and as municipal officials, seeking to enjoin the respondents from implementing portions of the State Finance Law of the State of New York and for a declaration that the said law is unconstitutional. Under Section 54 of the State Finance Law, payments are made by the respondents, or either of them, to cities and villages in the State of New York in accordance with a formula which provides that the

cities are to receive nine (9%) per cent of income tax collections made by the State of New York. The nine (9%) per cent thus received by cities in the State of New York is in addition to the amount received by them in sharing another nine (9%) per cent with the counties, towns and villages in this state.

The net result of these formulae is that cities are paid at a rate of eight dollars and sixty cents ($8.60) per capita as against a per capita payment of three dollars and sixty cents ($3.60) to villages pursuant to one section of the law, and, at the same time, receive six dollars ($6) in state aid for each one dollar ($1) received by villages under another part of the same law.

Reasons for Granting the Writ.

Although there are two concurring opinions, concurred in by the third member of the Circuit Court, neither one touches upon two of the key points urged by the petitioners (appellants) in that court. Specifically, no mention is made of the contention, strenuously argued, that the few major cities of the state are in a class by themselves and should be treated accordingly, and not be lumped together with the many small hamlets scattered throughout the state which happen to be called "cities." Stress is laid upon the fact that so-called "cities" have, in the abstract, broader powers than do "villages"; this really begs the question, since the criterion should be, in all logic, what powers do these hamlets called "cities" actually exercise; that is, what municipal services do they actually provide for their resident-taxpayers. How can anyone reasonably justify treating the City of Sherrill (pop. 2,986) the same as the Village of Lynbrook (pop. 23,776)? Conversely, how can there be any justification for paying, both in Nassau County, the City of

Glen Cove (pop. 25,770) state aid of $828,000 while paying the Village of Lynbrook $120,900!

In other contexts, the New York State Legislature recognizes that miniscule "cities" should not be treated the same as New York City, Buffalo, Albany, etc. For instance, in the Vehicle and Traffic Law, "cities" have been classified according to size (population) as follows:

> (a) City of the first class. A city with a population of 175,000 or more. (b) City of the second class. A city with a population of 50,000 and less than 175,000. (c) City of the third class. Any city not included in the foregoing classes.

Certainly, if it was not too difficult for the Legislature to make distinctions between cities of the first, second and third classes in the aforesaid statute, then it could have easily done so in the State Finance Law as well.

In further recognition of the need to differentiate between large and small cities, the Legislature enacted the Second Class Cities Law, comprising a statutory scheme of over one hundred (100) sections. Moreover, there are in the State of New York cities of the third class as well, according to Section 234 of the General Municipal Law. Having thus clearly recognized the need to classify cities according to size, the Legislature could not properly disregard such classifications in enacting the challenged portions of the State Finance Law. Certainly, the distribution of income tax moneys in the form of *per capita* state aid is as equally vital to the citizens of New York State, as are the matters which are dealt with in the Vehicle and Traffic Law, Second Class Cities Law and the General Municipal Law as referred to hereinabove. Therefore, the Legislature should have broken down the cities into first, second and third classes for equitable apportionment of state aid under the State Finance Law.

The other point overlooked by the honorable judges of the Circuit Court was the critical one pertaining to the matter of discriminatory preclusion; that is, that paragraph 2(g) of Section 54 of the State Finance Law perpetuated the inherent unfairness of the statutory scheme by expressly precluding "villages" from changing to "cities," as they formerly could, in order to be eligible for the preferential treatment accorded the latter. This pernicious section limits payments "* * * to the cities in the state in existence on April one, nineteen hundred sixty-eight * * *," thereby effectively barring the citizens of Lynbrook from changing the form of their local government from a "village" to a "city," in order to qualify for state aid six (6) times greater than they now receive.

Equal protection of the law means the protection of life, liberty and property by the enactment of equal laws. *Yick Wo v. Hopkins,* 118 U. S. 356 (1886). It prohibits all individious discrimination and requires equal protection to all in interposing no impediment to some of the people and not to others. It requires equal protection to all in imposing no greater burdens on some and not to others.

Although it may be true that the Legislature should enjoy great latitude in enacting state laws, nevertheless, the lawmakers should not be permitted to have absolutely free rein in passing legislation which plainly disregards the mandate of the constitution, and which discriminates against and oppresses a large segment of the citizenry in favor of another. It defies logic to apportion state aid to the City of Glen Cove at a rate of six (6) times that which is apportioned to the Village of Lynbrook, even though both municipalities have substantially the same population. Such a palpable inequality between the bur-

den imposed upon the residents of Lynbrook and the benefit received by them is so flagrant as to be confiscatory.

The distinction between "cities," both large and small, and "villages" in Section 54 bears no reasonable relation to the object sought after and accordingly, should be invalidated.

Baxtrom v. Harold, 383 U. S. 107 (1966). In this situation, there is no reasonable basis for such classification when such distinction violates equal protection of law and denies due process. *Bolling v. Sharpe,* 347 U. S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954); *Washington v. U. S.,* 401 F. 2d 915 (1960); *People v. Joy,* 271 N. Y. S. 2d 15 (1966); *Flemming v. Nestor,* 363 U. S. 603 (1960).

In view of all of the foregoing, it appears abundantly clear that there is presented here a substantial federal question which should be resolved by this August court. It is a very simple matter to write off the claims of village residents and characterize them as being *de minimis,* but the fact of the matter is that there are nearly one million residents of this state who reside in incorporated villages, and they pay into the state treasury many millions of dollars each year in the form of income taxes. To argue that they should have no say in how their money is spent is to assert that they are second-class citizens. It is all very well to say that we should not expect mathematical precision in the manner in which state aid is distributed, but nevertheless, when the residents of one community (village) are called upon to subsidize the residents of another community (city), then there exists an injustice which cries out for remedial action; and if that remedial action cannot be obtained from the Legislature, then resort must be had to the courts.

Conclusion.

For the reasons hereinabove set forth, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Dated, March 13, 1974.

Respectfully submitted,

JAY F. KORTH,
Attorney for Petitioners.